

Appellant, a 42-year-old city carrier, injured her neck on June 14, 1999 while loading tubs and trays of mail. She filed a claim for benefits on June 17, 1999, which the Office accepted for cervical sprain. On January 27, 2001 appellant injured her neck when she slipped on a patch of ice and hit her head on a truck. She filed a claim for benefits, which the Office accepted for cervical sprain.

On January 31, 2003 appellant injured her neck when she slipped and fell on a wet surface. She filed a claim for benefits, which the Office accepted for cervical sprain and herniated disc at C6-7 with cervical radiculopathy.

On January 4, 2005 Dr. James R. Lloyd, Board-certified in neurological surgery, performed anterior C6-7 decompression and fusion surgery to ameliorate appellant's conditions of cervical disc disease at C6-7, cervical spondylosis without myelopathy and broad-based disc herniation at C6-7 with central and left-sided posterior protrusion and foraminal encroachment. Appellant returned to light duty on February 14, 2006.

On September 15, 2006 appellant filed a Form CA-2a claim for benefits, alleging that she sustained a recurrence of disability as of August 10, 2006 causally related to her accepted cervical condition. The Office accepted the claim. Appellant returned to light duty, with restrictions, on October 1, 2006.

In a report dated April 30, 2007, Dr. Mehran Heydarpour, Board-certified in anesthesiology, stated that appellant had recently been off work due to increased upper trunk and upper extremity pain symptoms. He noted no neurological deficit of the upper extremity, any present muscular atrophy and adequate cervical range of motion on examination, with rotation from side to side causing exacerbation of her symptoms. Dr. Heydarpour reiterated appellant's previous work restrictions.

On May 7, 2007 appellant filed a Form CA-2a claim for benefits, alleging that she sustained a recurrence of disability as of April 11, 2007 causally related to her accepted cervical condition.¹

In a May 22, 2007 report, Dr. Heydarpour reiterated that the persistence of appellant's cervical spine symptoms and associated radiculopathy symptoms had caused her to remain off work.

In a July 13, 2007 statement, received by the Office on July 20, 2007, appellant stated that the employing establishment had treated her unfairly since her January 2005 cervical surgery. She asserted that her supervisor had considered her an asset to the employing establishment in October 2004 but had since told her work was unsatisfactory. Appellant stated that following her January 2005 surgery she returned to work on a part-time basis in February 2006. She stated that during this time management had her sit at a table and write second notices for certified letters, an activity which she performed for four hours every day. Appellant alleged that this job caused severe neck and shoulder spasms and numbness in her hands, which resulted in a recurrence of disability in August 2006. When she returned to work on October 1, 2006, she was given restrictions of not working continuously for more than 20 minutes, taking breaks every 20 minutes or whenever she needed to relax her neck and shoulder muscles. Appellant believed she could work eight hours per day with these restrictions,

¹ In CA-17 forms dated April 17 and 30, 2007, the employing establishment stated that "limited duty is available for [appellant] and we can accommodate nearly any and all medical restrictions."

however, she asserted that management refused to adhere to these restrictions and failed to provide her with adequate work duties:

“The first three weeks in October 2006 I was told to sit in the lunch room and do nothing. I was amazed that they didn’t even have me answer the phones, I was told by many of the other carriers and by a boss that was training that my boss wanted to get rid of me. Then they said I would be a lobby director helping window clerks with the customers. I was glad to do anything and went out of my way to keep busy and whatever I could[,] taking breaks when I would feel my neck and shoulder muscles tighten up. [W]hen that would happen I would have to go relax in my car until I felt better. [My supervisors] would come out and tell me I’d have to go in, if that happened I’d lay on the restroom floor because that is the only way I could get the pain [to] go away....”

Appellant asserted that she experienced periodic flare ups of her cervical condition but was unable to go home because she had exhausted all of her sick leave while undergoing surgery and postoperative rehabilitation. She also stated that her supervisor became rude and condescending to her when she requested to be laid off for a week or two so she could lay down at home. Appellant alleged that her supervisor would threaten her with termination and tell her that her coworkers wanted her to permanently leave the workplace. She further stated that the week before her alleged recurrence of disability, she had attempted to work light duty but was told none was available, which contradicted her own impressions.

In a July 24, 2007 report, Dr. Heydarpour related the history of injury and noted that he had been treating appellant’s cervical condition since August 2006, when she was not working. He stated that she returned to work with restrictions in October 2006 but since then had noted exacerbation of her cervical spine symptoms and associated radiculopathy, which she believed was worse than what she experienced prior to her surgery. Dr. Heydarpour noted that a magnetic resonance imaging (MRI) scan appellant underwent in November 2006 indicated slight retrolisthesis at C5-6, slight anterolisthesis at C-TI and mild cord deformity on the left at C5-6 and very shallow midline disc herniations or focal bulges at C3-4 and C4-5. He opined that such findings could constitute complications and progressions from her previous cervical fusion, and is commonly derived residuals from such an operation. Dr. Heydarpour also noted that a May 2007 cervical myelogram revealed the presence of mild anterior effacement of the thecal sac at C5-6 associated with a definite right C5-6 nerve root sheath cutoff, a left C5-6 nerve root sheath, and slight right nerve root sheath cutoff at C4-5. Based on these findings, he recommended that appellant consider additional cervical surgery. Dr. Heydarpour stated, however, that, since appellant had experienced exacerbation of her symptoms following surgery, she was reluctant to undertake any additional intervention.

In addition, Dr. Heydarpour related that appellant indicated that, if her supervisor had allowed her to take a break every 20 minutes at work and had permitted her to lie down periodically, her cervical symptoms might have improved. He noted that she had asserted that her supervisor forbid her from engaging in these potentially ameliorative actions and told her that she would jeopardize her job status if she called in sick. Dr. Heydarpour stated that it was his understanding that appellant’s supervisor had reported in October 2004 that appellant was a

“good worker” and that if she felt uncomfortable she should report to work daily to punch in for one minute and then leave.

By decision dated August 13, 2007, the Office denied appellant’s claim for a recurrence of disability.

On September 10, 2007 appellant requested a review of the written record.

By decision dated November 20, 2007, an Office hearing representative set aside the September 10, 2007 decision. The Office found that Dr. Heydarpour’s reports, while not completely rationalized, had raised an uncontroverted inference of causal relationship between the claimed injury or disability and the accepted employment condition and were sufficient to require it to further develop the evidence. The hearing representative therefore remanded the case to the Office for further development of the medical evidence regarding causal relationship between appellant’s condition and her accepted cervical condition. He, noting that both appellant and Dr. Heydarpour had implicated work-related cervical injuries she sustained in 1999, 2001 and 2003 in the instant recurrence of disability claim, also instructed the district Office to combine the two prior claims with the current case. The hearing representative instructed the district Office to prepare a statement of accepted facts and refer appellant to an appropriate specialist for an opinion as to whether any of her work injuries objectively contributed to her alleged recurrence of disability, to the point where she could no longer perform her light-duty job. He further instructed the district Office to ask the specialist whether the changes found on the claimant’s last cervical MRI scan were causally related to the original work injury. Finally, the hearing representative instructed the district Office to obtain a copy of appellant’s job description at the time she stopped work and include a description of the duties and physical demands of this position in the statement of accepted facts, and to ask the specialist what her work restrictions are and whether she required frequent rest breaks and opportunities to periodically lay down throughout the workday.

On January 24, 2007 in order to determine appellant’s current condition, the Office referred appellant to Dr. Stephen Barron, Board-certified in orthopedic surgery, for a second opinion examination. In a report dated February 18, 2007, Dr. Barron noted the history of injury and reiterated the diagnoses of postoperative, anterior cervical discectomy and fusion at C6-7, multilevel degenerative disc disease of the cervical spine and opined that she permanently aggravated her preexisting degenerative disc disease at C6-7 when she sustained her January 2003 work injury, as demonstrated by MRI scan. He advised that, while appellant continued to suffer residuals from that injury and continued to have subjective complaints in her neck and left arm radiation, she did not require any future treatment for the January 2003 employment injury. Dr. Barron opined that based on his evaluation appellant was capable of working full time with restrictions of no lifting more than 25 pounds and no repetitive neck bending. He stated that appellant’s current condition was not related to the January 31, 2003 work injury, from which she reached a healing plateau as of January 4, 2006, which was one year after her cervical surgery, but was related to the degenerative disc disease at C5-6, a natural progression of appellant’s preexisting degenerative disc disease unrelated to the accident on January 31, 2003. Dr. Barron advised that the subsequent changes as seen on the 2007 computerized tomography (CT) myelogram were also attributable to the natural progression of preexisting degenerative disc disease, not the January 2003 injury. He concluded that appellant’s

work injuries did not objectively contribute to her current disability to the point where she could no longer continue to work her modified lobby director job.

In a report dated September 11 2007, Dr. Heydarpour reviewed the history of injury, reiterated the previously stated diagnoses and noted that a May 2007 cervical myelogram showed: degenerative facet changes at C7-T1, a large degenerative spur off the anterior inferior aspect of C5 vertebral body abutting the immobilization plate at C6-7 (the C7 screws project far posterior) and right uncovertebral joint hypertrophy at C3-6, causing some right neural foramina encroachment. He stated:

“Based on these findings and [the] history provided, it is my opinion that [appellant] can no longer perform her employment duties as described to me, including sitting at a desk. She needs to take breaks as needed due to muscle tightness and pain. It is possible that these breaks would be frequent and require lying down. Additional surgery is an option. [Appellant] had surgery on January 4, 2005 and is experiencing difficulties with no improvement in her symptoms, therefore she has been reluctant to proceed with any additional intervention at this time.

“Due to [appellant’s] persisting cervical spine and upper extremity symptoms her return to work is uncertain at this time.”

On January 25, 2008 the Office received a position description for lobby director from the employing establishment. It stated that the lobby director position could be done sitting and standing and entailed the following duties: assisting customers with the automated postal center, handing out any forms the customer may need, directing customers to a window clerk if needed, helping customers pick out any postal items that are for sale and assisting customers with the packaging of the items for automated postal center.

In a report dated April 1, 2008, Dr. Lloyd stated:

“I am responding to your letter dated February 27, 2008 concerning [appellant].

“It is my feeling that, with a reasonable degree of medical probability, that [appellant’s] dis[c] injury at C5-6 is indeed related to her work injury. These processes that she has at the C5-6 level [are] degenerative in nature but was made symptomatic and accelerated beyond its normal progression due to the known work injury.”

The Office found that there was a conflict in the medical evidence between appellant’s treating physicians, Drs. Lloyd and Heydarpour, who opined that appellant was currently disabled due to her accepted cervical condition and Dr. Barron, the second opinion physician, who opined that appellant was not disabled and could perform light duty with restrictions. It referred the case to a referee medical specialist, Dr. James B. Stiehl, Board-certified in orthopedic surgery. In an April 30, 2008 report, Dr. Stiehl stated findings on examination, reviewed the medical history and the statement of accepted facts and stated:

“I reviewed the specific job descriptions for a lobby director. That person basically assists customers with the automated postal center, hands out forms when requested, directs customers to a window clerk if needed, helps customers pick out postal items for sale and assists customers with packaging items. This, to me, sounds like a very sedentary and limited-type of job.”

Dr. Stiehl opined that appellant’s January 2003 injury had resolved and stated that she reached maximum medical improvement from her work-related injury at the end of 2006. He advised that appellant apparently had not experienced any additional changes of her upper extremities consistent with the original radiculopathy or any significant progression of her accepted condition. Dr. Stiehl asserted that since appellant had not really returned back to work he was unable to attribute the current progression of her symptoms to work-related activities. He noted that appellant continued to have chronic neck pain which could be in part related to the January 2003 work injury, but only insofar as her condition was affected by the after effects of her January 2005 cervical fusion procedure.

Dr. Stiehl advised that appellant currently had no apparent problems requiring surgical intervention or additional treatment and had no current radicular symptoms. He stated that he would place the same restrictions on appellant that Dr. Barron had indicated in his January 2007 report, such as no lifting exceeding 25 pounds and being permitted at least two 20-minute breaks and possibly a 30-minute break during the middle of the day. Dr. Stiehl also concurred with Dr. Barron’s opinion that the majority of her chronic neck pain was attributable to the natural progression of nonwork-related degenerative joint disease of the cervical spine. While he agreed that appellant could have some symptoms and residuals from the January 2003 employment injury, he did not believe that those chronic residuals would require further treatment or prohibit her from returning to work with the restrictions noted above. Dr. Stiehl did not believe that appellant had a recurrent disability that would limit her from doing the “very limited duty” defined as a lobby director.

By decision dated May 9, 2008, the Office denied appellant compensation for a recurrence of her accepted cervical condition. It found that she failed to meet her burden to establish that the lobby director job exceeded her work restrictions or that on April 11, 2008 she had an objective worsening of her work-related cervical condition.

On May 20, 2008 appellant requested reconsideration of the May 9, 2008 Office decision. She did not submit any additional factual or medical evidence.

By decision dated June 6, 2008, the Office denied appellant’s application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability. As part of this

burden, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.²

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.³

ANALYSIS -- ISSUE 1

In order to resolve the conflict in the medical evidence between appellant's treating physicians, Drs. Lloyd and Heydarpour and Dr. Barron, the second opinion physician, the Office referred the case to a referee medical specialist, Dr. Stiehl, who opined that appellant currently had no cervical problems or radicular symptoms causally related to her January 2003 employment injury which would require surgical intervention or additional treatment. Dr. Stiehl stated that most of appellant's chronic neck pain was attributable to the natural progression of nonwork-related degenerative joint disease of the cervical spine and not to her 2003 work injury. He stated that appellant might have some symptoms and residuals from the January 2003 employment injury, however, he did not believe that these residuals required further treatment or prohibited her from returning to work with the prescribed restrictions. Dr. Stiehl reviewed the position description for lobby director and concluded that appellant did not have a recurrent disability that would preclude her performing the limited, very sedentary duties of a lobby director. He advised that appellant could work the lobby director position so long as she was able to adhere to Dr. Barron's January 2007 restrictions of no lifting exceeding 25 pounds and being permitted at least two 20-minute breaks and possibly a 30-minute break during the middle of the day. The Office relied on Dr. Stiehl's opinion in its May 9, 2008 decision, finding that appellant had no residuals or continuing disability stemming from her January 2003 work injury and was therefore not entitled to compensation or medical benefits.

The Board finds that Dr. Stiehl's referee opinion constituted medical evidence sufficient to establish that her condition and/or disability as of April 11, 2007 was not caused or aggravated by her January 2003 injury. His opinion is sufficiently probative, rationalized, and based upon a proper factual background. The Office properly accorded Dr. Stiehl's opinion the special weight of an impartial medical examiner.⁴ Accordingly, the weight of the medical evidence establishes that appellant has not met her burden to provide a medical opinion which relates her condition or disability as of April 11, 2007 to her employment injury and shows a change in the nature and extent of appellant's injury-related condition.

In addition, the Board finds that the evidence fails to establish that there was a change in the nature and extent of appellant's limited-duty assignment such that she no longer was physically able to perform the requirements of her light-duty job. The record indicates that appellant returned to work for the employing establishment from October 1, 2006 to April 11,

² *Terry Hedman*, 38 ECAB 222 (1986).

³ *Regina T. Pellecchia*, 53 ECAB 155 (2001).

⁴ *Gary R. Seiber*, 46 ECAB 215 (1994).

2007 as a modified lobby director with restrictions entailed by her work-related cervical condition. While she continued to claim that the job did not accommodate her work restrictions, thus contributing to the aggravation of her accepted cervical condition, the employing establishment denied these assertions. Appellant failed to submit factual evidence supporting her claim that the light-duty job exceeded her work restrictions and resulted in a recurrence of her work-related disability. For this reason, she has failed to establish her claim that she sustained a recurrence of disability as a result of her accepted employment injury.

Accordingly, as the weight of the factual and medical evidence shows that appellant was not totally disabled from performing her light-duty assignment as of April 11, 2007 as a result of her accepted cervical condition, she failed to meet her burden of proof. She was not entitled to compensation based on a recurrence of her employment-related disability. The Board will affirm the May 9, 2008 decision.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by constituting relevant and pertinent evidence not previously considered by the Office.⁵ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁶

ANALYSIS -- ISSUE 2

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law, she has not advanced a relevant legal argument not previously considered by it and she has not submitted relevant and pertinent evidence not previously considered by it. Appellant's request for consideration has failed to show that it erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. The Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

CONCLUSION

The Board finds that appellant has not met her burden to establish that she was entitled to compensation for a recurrence of disability as of April 11, 2007 causally related to her accepted cervical condition. The Board finds that the Office properly refused to reopen her case for reconsideration on the merits of her claim under 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

⁶ *Howard A. Williams*, 45 ECAB 853 (1994).

ORDER

IT IS HEREBY ORDERED THAT the June 6 and May 9, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: June 3, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board